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Remarks to The Sydney Institute
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Current Issues in the United States/Australia Relationship

Thank you for your kind words.

Let me begin by expressing my appreciation to Gerard and the members of the board of The Sydney Institute and to everyone joining us tonight for this discussion. Since its inception in 1989, The Sydney Institute has been at the forefront of public debate in Australia. Through The Sydney Papers, the Institute greatly contributes to the understanding of history, art, literature, and the complex political issues of the day, both in Australia and beyond. I am honored to be with you tonight.

As you may know, I have been traveling across your remarkable country listening to what Australians have to say about America and learning about the breadth and depth of our relationship with Australia on so many different levels. For instance, I have learned that the contacts and interaction of our citizens are even more extensive than I thought. Roughly 90,000 Australians live in America, more than live in the Middle East, Central & South America, and Africa combined, and more than 400,000 Americans visited Australia this past year, hopefully, from an Australian point of view, spending money every chance they get and

contributing to the robust Australian economy. Export natural resources and import Yank tourists. Not a bad economic strategy.

Everywhere I go, I discover American expats. I can always tell how long they have been in Australia. Those who can explain the rules of footy have been here a long time. Those who can explain the rules of cricket have been here a ***really*** long time.

Not to bring up a sore subject, but I didn't understand the recent headline about Australia being beaten by 10 wickets by a side I won't name but whose initials are KIWI. I had been assured that only runs counted in determining the winner of a one day 50-over match, and then it seemed that the Kiwi's changed the rules and started counting the darn wickets. No wonder the Aussie's lost. Then it was explained to me and now I understand that the 10 wickets headline was just adding insult to injury in an unhappy loss. As one of my Australian friends commented: at least, it wasn't against the Bloody Poms. Things will go better at the World Cup I am assured.

You won't be surprised to learn that, besides cricket, the Aussie/U.S. trade relationship is of great interest to me. That's because the Free Trade Agreement, now in its third year, presents enormous opportunities for both our countries. The FTA is creating unparalleled prospects for increased commercial activity for businesses and higher quality/lower priced goods and services for consumers in both our countries. Americans and Australians can travel and work more easily in both countries. That increased flow of human capital will lead to innovations and breakthrough concepts as well as expanded interchanges and cooperative activities in multiple areas.

In the multilateral context, the U.S. and Australia share similar and mutually supportive interests. We work side-by-side in APEC and the WTO to open international markets and level the playing field for commercial activities. Our two countries are leading efforts in APEC to create a regional economic community spanning the public and private sphere. In the Doha round to the WTO negotiations, both are pursuing a bold and aggressive agreement that would benefit not only to our two nations but also the world's developing nations. President Bush very much looks forward to visiting Australia for the APEC summit later this year, and I applaud Australia's successful launch of APEC activities this past January.

Put simply, Australia and America have found that globally connected economic, communication, financial, and energy systems have brought increased prosperity and a higher standard of living to our two countries and to millions of others around the world.

Both Australia and the United States have committed to assist emerging democracies and developing countries. Like the United States, Australia is focusing that aid to accelerate economic growth, assist functioning and effective governments, invest in people, and promote regional stability and cooperation.

Most importantly, I hear a lot about a similar commitment by our two nations to an open, free, and diverse society based upon effective, representative, and accountable government institutions and adherence to the rule of law. Americans and Australians are linked through language, culture, sports, music, free enterprise, and a shared faith in a democratic society and individual freedom.

Because of those connections, we also understand that defending our values and our way of life requires courage and self-sacrifice. We have cooperated in every feasible way in confronting the threat of terrorism. Our intelligence agencies and law enforcement communities assist each other. We work together to develop and share military technologies. Regionally and globally, we strive to prevent the proliferation of dangerous weapons and to promote stable, democratic governments.

I recently attended the sixty-fifth anniversary of the bombing of Darwin, and I was both inspired and humbled by encounters with members of what Tom Brokaw termed the Greatest Generation, Australians and Americans who fought and sacrificed during World War II to defeat fascism and preserve liberty. Then they went out and won the peace as well by providing aid and support which, ultimately, transformed Germany and Japan into the close friends and allies of both our nations that they are today.

Australians and Americans stood shoulder to shoulder through the darkest hours of the twentieth century. When terrorists attacked my homeland at the beginning of a new century, Australia was there for the United States. I hope all of you, and your friends and families, know that my countrymen understand America has a true ally in Australia.

We Americans don’t say it often enough or clearly enough, but courageous young diggers are out there day and night with U.S. troops to protect both nations from a determined and violent enemy bent on the murder of innocents and the destruction of our way of life. We Americans not only owe the men and women of our U.S. armed forces a profound debt of gratitude; we owe the same debt of gratitude to the men and women of the Australian Defense Force. Vice-President Cheney took the opportunity to express that gratitude to members of the Australian Defense Force last week at the Victoria Barracks.

Military and political leaders have a fundamental obligation to protect their citizens, and today we confront continuing battle against a violent, hateful, and ruthless ideology that is determined to sow chaos and destruction in virtually all civilized countries. I fear that we tend to ignore the indisputable fact that the al-Qaida terrorists and associated forces have expressly declared war and are continuing to wage war against those who value diversity, freedom, gender equality, individual liberty, and the rule of law. Perhaps we do so because it is incomprehensible to most Australians and Americans that anyone could subscribe to such a distorted and perverse version of one of the world's great religions.

Australians, Americans, and the innocent citizens of many other nations have lost their lives in horrific terrorist attacks. The United Nations, NATO, OAS, and ANZUS all recognized the attacks on the United States as acts of war.

Under both established international law and U.S. domestic law, the United States is entitled to detain captured enemy combatants for the duration of those hostilities, just as Australia detained for the duration of hostilities irregular partisans fighting on behalf of the Japanese during World War II. In *Hamdi v. Rumsfeld,* the U.S. Supreme Court, through an opinion written by Justice Sandra Day O'Connor, confirmed that the detention of enemy combatants for the duration of a particular conflict is a fundamental and accepted principle of the law of war and consistent with U.S. law.

Yet the right to hold terrorist enemy combatants has been poorly understood. People in both Australia and the United States have expressed concern that, since the enemy is not a nation state and since the enemy is both global, untraditional, and "asymmetrical", hostilities may not end for the foreseeable future, and those detained could effectively serve life sentences without any reasonable proceeding validating such detention. We all share this concern, and so I would like to spend the rest of my time discussing wartime detention and the future U.S. military commissions, hopefully to identify some aspects of these controversial issues that might contribute to an informed debate.

We all recognize that every war in history was of uncertain duration while it was being fought, and we all recognize that hostilities have not ended in this one. However, I suggest to you that, if the established right to detain enemy combatants during the duration of the hostilities should not apply in this war because there is no end in sight today, then logic has been turned on its head. It is in effect arguing that fanatics should not be detained because their very uncompromising extremism makes a quick victory unlikely. It is their very fanaticism that makes these terrorists even more dangerous to civilized society than a traditional uniformed enemy

and thus makes their detention even more important to the safety of innocent civilians of all nations.

That having been said, we must balance that need for security and safety against certain core principles, our belief in the dignity and worth of every human being and our commitment to the rule of law. We can not allow these terrorists to intimidate us into compromising the very democratic ideals for which we are fighting. In order to address these concerns, the United States established appropriate administrative proceedings to ensure first, that the individuals detained are indeed enemy combatants and second, that any detainee not accused of a war crime is released if he no longer poses a danger to the United States or the other members of the international community of civilized nations.

Each detainee at GTMO is evaluated by a Combatant Status Review Tribunal (CSRT) to determine whether the designation as an enemy combatant is correct. The detainee can present information to contest the designation, and every decision of the CSRT is reviewed by a higher administrative authority. The detainee can then appeal the designation to a civilian federal court if he contends the designation is erroneous.

If a detainee is determined to be an enemy combatant and is not charged with a war crime, the detainee then receives an annual review by an Administrative Review Board (ARB) to determine whether there is a need for continued detention such as intelligence value or a continuing serious risk to the United States. If not, the detainee will be released or transferred. The factors establishing the risk posed by each detainee are obviously unique in each case, but it would be reasonable to consider statements of intention to harm America and its allies made before and after capture; attendance at multiple terrorist training camps; expertise in explosives and sophisticated weaponry; participation at multiple venues in activities of different terrorist entities; acts indicating an intention to engage in combat such as traveling from a non-combatant nation into a theater of conflict; the circumstances of capture; and the lack of cooperation and compliance once detained.

These CSRT and ARB procedures meet or exceed any process required under international law, U.S. domestic law, or existing treaties. These procedures are intended to ensure that no person is detained unless he is in fact an enemy combatant, and that no enemy combatant is held longer than necessary. Over 300 Guantanamo detainees have been released or transferred under these procedures. Given al-Qaida training in deception and denial once captured, it is not surprising that over a dozen of those released have returned to the conflict and been identified after being recaptured or killed in combat.

The President has said he would like to close Guantanamo, but the international community has suggested no realistic alternative for the protection not just of the U.S. but also of the international community itself from those appropriately determined to be dangerous terrorists. So the United States has created a state-of-the-art facilities at Guantanamo equal to if not better than other high security U.S. prisons. It is no gulag. Detainees live in spartan but adequate and functional quarters. They have access to a growing 5000 volume library, exercise and recreation facilities, excellent health care, meals consistent with dietary, religious and cultural requirements, timely opportunities for religious worship, monitored correspondence with the outside world, and access to pro-bono attorneys to represent them.

The International Committee of the Red Cross regularly inspects the facility and meets privately with detainees. Foreign government officials from more than 30 countries and numerous international delegations have visited the facility. On one such inspection by the Organization for Security Cooperation in Europe, Madame Lizin, the speaker of the Belgian Parliament, concluded that GTMO was a “model prison” in which inmates were treated better than in Belgium jails.

American military personnel provide a stable, controlled environment under challenging circumstances. In a recent one-year period, the guards endured 432 assaults with bodily fluids such as a frequently used, noxious combination of semen, feces, and urine. There were also 227 physical assaults and 99 efforts to incite a riot or disturbance. It is a testament to the training and good discipline of these young soldiers and sailors that they treat detainees appropriately.

Torture or abuse of detainees is not tolerated. All credible allegations of abuse of detainees are investigated, and the U.S. has not hesitated to prosecute criminally or discipline administratively any guards who violate those standards, regardless of provocation.

In Australia, attention has been focused on the case of David Hicks who was determined by a CSRT to be an enemy combatant and who is also accused of war crimes. Last week, the Convening Authority referred the charge of providing material support for terrorism to a military commission for trial. Rather than talk about the specifics of the Hicks case (which I will be more than willing to do in the question and answer period), let me address concerns about the propriety and fairness of the military commission process in general.

The debate about military commissions has, in my view, suffered from a failure to recognize the existence of two different legal structures. All of us are familiar with a civilian, domestic criminal law system, which deals with conventional crimes such as assault, fraud, and robbery, generally

within the geographic boundaries of the nation. When a domestic crime is committed, police have the time and resources to investigate, collect and maintain a chain of custody on evidence, and interview witnesses. Witnesses can then be compelled to appear in a domestic criminal court to provide evidence for the prosecution or defense.

A different legal structure has existed in international law for decades in order to deal with the very different circumstances of war and armed conflict. War involves hostile acts usually by non-citizens, most often outside the geographic boundaries of the nation. Domestic courts frequently lack jurisdiction over non-citizens outside its geographic territory. There is a "fog of war", a confusion and chaos on the ground. There is an immediate necessity to devote available resources to achieve military goals and objectives rather than to investigate, identify witnesses, and preserve evidence. All of these factors have long been recognized to mandate a different legal architecture for war crimes, one suited to the circumstances of armed conflict.

International law and domestic U.S. law define the appropriate legal system for war crimes to be a military system within established parameters. In the U.S., military commissions have existed since George Washington's time when they were used to prosecute British spies. After World War II, in addition to the Nuremberg trials, the allied powers, including Australia, conducted hundreds of war crimes trials through military tribunals. Military commissions are not new. Nor have they been kangaroo courts.

In 2001, President Bush ordered the establishment of military commissions to try enemy combatants for violations of the laws of war. The President proceeded under our Constitution and Congress's prior Authorization for the Use of Military Force. He did not seek further legislative approval for the procedures he adopted.

In *Hamdan v. Rumsfeld*, the Supreme Court, on a very close question of law, reversed a unanimous Circuit Court of Appeals decision upholding the President's actions. The Supreme Court ruled that Congress needed to authorize explicitly the use of military commissions. If just one justice in the majority had ruled otherwise, the decision of the Court of Appeals upholding the President's actions would have been affirmed on a 4-4 vote.

Congress then addressed the Court's concerns by passing the Military Commissions Act (MCA), which President Bush signed into law in October 2006.

Australians are understandably angry at the delay. Demands by the Australian government that the commissions proceed as expeditiously as

possible have been made over a long period of time at the highest levels of the U.S. government, and frankly, many Americans, including officials working on detainee matters, share this frustration. We all wish the legal process had moved faster, but the Executive Branch cannot, under our checks and balances of the Constitution, dictate the schedules or actions of the Legislative or Judicial Branches.

I have previously stated that the delay was in fact caused by America's devotion to the rule of law in that the detainees were afforded the opportunity to challenge in our civilian courts the very process of adjudication before it even started. It was interpreted by some as my saying that the delay was Mr. Hicks' fault. It is not Mr. Hicks' fault. It is not anybody's "fault." It is simply a consequence of our legal system, a consequence that we in America accept because of the benefits provided to our democracy and the rule of law.

Consider for a moment what is an old joke poking fun at the legal profession. It is called the lawyer's prayer supposedly offered up regularly by private practice attorneys who earn legal fees in court proceedings. The prayer goes: "God bless the lawyer that sues my client." Think about it. Private practitioners have a financial incentive for that prayer, but let me suggest that U.S. government lawyers, who reap no financial gain when their client (the U.S. government) gets sued, have an even better reason to embrace that prayer.

In my life as a government lawyer, I always remembered that our democratic republic benefited when government action or inaction was challenged in our courts. Litigation tests the government, and it is good for our society. It is part of our political process. It attracts attention and provokes debate. It reflects our suspicion of governmental power.

Our legal culture and history encourages, one might even say requires, the resolution of novel and important legal issues before a series of appellate courts. Americans believe that the time involved is well invested in clarifying the law and making sure that we find the appropriate, delicate balance between government power and individual rights. Australians want us to get that balance right as well; you just want us to do it quicker than we were able to accomplish it under our system.

I submit to you that we have now gotten it right even though the current statute and Manual for Military Commissions will no doubt be challenged on as many grounds as lawyers for detainees can conceive. I ask you to consider these facts. Consistent with Common Article 3 of the Geneva Conventions, military commissions are regularly constituted courts, affording all the necessary "judicial guarantees which are recognized as indispensable by civilized peoples." In structure, the commissions share core commonalities with the military courts-martial system. All military

prosecutors, commission members, and judges take an oath to fulfill their respective roles objectively and independently and to adhere to the rule of law. The courts-martial structure enjoys a history of fairness and objectivity, and it includes safeguards to prevent any interference or influence by the chain of command.

Fair trial guarantees include the presumption of innocence, the right of an accused to remain silent, the requirement for proof beyond a reasonable doubt, the exclusion of evidence obtained through torture or in violation of the prohibition against cruel, inhumane, or degrading treatment, the right to call and cross-examine witnesses, and the right to counsel.

The U.S. provides counsel at government expense for every person tried before military commissions, and private counsel may also participate in the trials and appeals. No one in Australia can claim that Mr. Hicks has not been represented by zealous advocates paid for by the U.S. government.

Where the procedures of the commissions differ from those of civilian courts, there are sound and understandable reasons, and the differences are carefully calibrated to preserve the fundamental fairness of the process. For instance, the potential for the admission of hearsay evidence has been criticized as a crucial deficiency in the commission process. However, the general rule against hearsay evidence in civilian domestic courts is far from absolute. It is riddled with exception after exception from the common law and from statutes.

All of these exceptions are based upon what we lawyers call “a circumstantial guaranty of reliability” and a practical necessity in using hearsay to determine the true facts. For instance, there are practical difficulties in locating witnesses in the international context and compelling their attendance at the trial, and so international war crimes tribunals (such as The Hague) have for decades permitted hearsay statements. Britain allows the admission of hearsay evidence under its Criminal Justice Act of 2003 whenever it is deemed in the interests of justice. Hearsay evidence in the MCA is only admitted if the judge finds it to be both probative and reliable. The admission of hearsay evidence under such circumstances is not new. Nor does it compromise the integrity of the process since a circumstantial guaranty of reliability must be found to be present.

Another major criticism is the potential admission of allegedly “coerced” statements. Statements obtained by torture are, as I previously indicated, flatly excluded. The regulations actually ban coerced statements unless there are several affirmative findings by the judge. Because “coercion” is a difficult concept to measure, the judge must determine, by the totality of the circumstances, whether the statement is both probative and reliable

and whether the interests of justice would be best served by its admission. This burden of proof is significant because it creates a presumption for the exclusion of such evidence and requires the prosecution to overcome that presumption.

The third most frequent criticism involves the potential use of classified evidence. The defendant's need to confront and rebut evidence must be balanced against the national security implications of disclosing vital information on sources and methods which might place lives in jeopardy or compromise the continuing collection of valuable intelligence that can save lives. Let me make one point loudly and clearly: the Military Commissions Act provides that the defendant must see all evidence presented against him in the military commission proceedings. He will not be convicted on evidence he has not seen.

The Manual enables the judge to determine whether certain classified matters should be redacted, summarized, or released in substitute form, but the accused will be presented with all the evidence that the commission considers in determining guilt or innocence. If the judge determines that any alternative to full disclosure is inadequate, and the evidence is otherwise exculpatory or necessary for the defense to prepare for trial, the judge may issue orders in the interest of justice excluding all or part of the classified testimony, finding against the prosecution on any issue as to which the evidence is probative, or dismissing the charges. Bottom line, the accused gets to see everything that the commission panel, the "jury" if you will, sees.

If a detainee is convicted, he has extensive post-trial appeal rights. The MCA provides for an initial appeal to a military review court. Beyond that, detainees may appeal to the U.S. Court of Appeals for the D.C. Circuit and ultimately to the U.S. Supreme Court.

Australians and Americans share a common belief in the rule of law and "a fair go" for every individual accused of a crime, including war crimes. The military commission structure has been created not only to hold accountable those who may have committed war crimes but also to protect the interests of each accused by giving each a fair go. No other nation engaged in armed conflict has ever done as much.

Gerard, I again give you my thanks for allowing me to participate in The Sydney Institute's program this evening so that I could discuss with you a variety of issues that are important to Australia and the United States. As the U.S, Ambassador, I am constantly thinking about all that binds our two nations together, and my participation this evening not only allows me to give you my thoughts and perspective but also to listen and learn from you and your members. I will be happy to receive comments on the

subjects covered or questions on any other issues of interest to this distinguished group.